UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

--X 10-CV-0022 (RER)

JOSEPH DANIELS,

Plaintiff,

-against-

1710 REALTY LLC, a/k/a 1710 REALTY ASSOCIATES,

Defendant.

--X

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF DEFENDANT 1710 REALTY LLC

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Defendant 1710 Realty LLC, a/k/a 1710 Realty Associates, by its attorneys, McCarter & English, LLP, hereby submits the following proposed findings of fact and conclusions of law in connection with the bench trial held on April 6, 2011 before The Honorable Magistrate Judge Ramon E. Reyes, Jr. For the reasons set forth below, the Court should adopt the following findings of fact and conclusions of law and render Judgment in favor of 1710.

PROPOSED FINDINGS OF FACT

1. Defendant 1710 Realty LLC ("1710") owns and operates an apartment building located at 1710 Union Street, Brooklyn, New York (the "Building"). (Joint Pretrial Order, Stipulated Facts ¶ 1).

2. Wolf Sicherman ("Sicherman") is a member of 1710. (Sicherman Testimony, Tr. at 81:12-17).

3. Plaintiff Joseph Daniels ("plaintiff") was hired by 1710 as a superintendent for the Building in or around August 1994. (Daniels Testimony, Tr. at 7:13-24; Sicherman Testimony, Tr. at 81:21-82:3; 87:20-88:24).

4. Plaintiff was employed by 1710 as superintendent for the Building until August 2009, when his employment was terminated. (Daniels Testimony, Tr. at 14:16-20; Joint Pretrial Order, Stipulated Facts ¶ 3).

5. Sicherman, through his management company, currently manages between eighteen (18) and twenty (20) residential apartment buildings. All but one of these residential properties are located in Brooklyn, New York. (Sicherman Testimony, Tr. at 126:25-127:4).

6. The residential apartment buildings that Sicherman's company manages range in size, with the smallest consisting of eight (8) residential units and the largest consisting of one hundred forty (140) residential units. (Sicherman Testimony, Tr. at 127:5-11).

7. The Building consists of thirty-nine (39) residential units. (Daniels Testimony, Tr. at 37:21-25).

8. The Building also has approximately seven commercial units, but plaintiff had no rcsponsibility with rcspcct to thc commercial units. (Daniels Testimony, Tr. at 38:1-15).

9. Sicherman also manages other residential properties that are comparable in size to the Building. (Sicherman Testimony, Tr. at 89:16-23; 112:10-15).

10. On or about April 15, 1994, plaintiff began working for Sicherman's management company as a handyman. (Daniels Testimony, Tr. at 7:13-18).

11. At the time, Sicherman's management company utilized the services of an agency called The Super Agency, which provided Sicherman's company with handymen who were able to perform various jobs for his residential properties. (Sicherman Testimony, Tr. at 81:20-82:1).

12. The Super Agency provided Sicherman's management company with several individuals who could perform work as a handyman, one of which was the plaintiff. (Sicherman Testimony, Tr. at 82:1-3).

13. As a handyman, plaintiff's responsibilities included handling minor repairs, such as faucet leaks, fixing door locks, and replacing air valves. (Sicherman Testimony, Tr. at 82:23-83:25).

14. Plaintiff performed these services for a number of different properties managed by Sicherman's company on an as-needed basis. Plaintiff was paid an hourly rate for his services. (Sicherman Testimony, Tr. at 82:23-83:12).

15. Plaintiff performed services for Sicherman's management company as a handyman for approximately four months. (Daniels Testimony, Tr. at 7:19-21).

16. After four months, Sicherman offered plaintiff a job as superintendent of the Building. (Sicherman Testimony, Tr. at 88:18-23).

17. Upon hiring a superintendent for any of his properties, Sicherman informs each individual of the hours of work required for the position. (Sicherman Testimony, Tr. at 89:9-13).

18. It is Sicherman's practice to inform each building superintendent hired to work at properties comparable in size to the Building that the required hours of work are between five and six hours per day during weekdays. (Sicherman Testimony, Tr. at 89:9-23; 112:19-23).

19. A property containing only thirty-nine (39) residential units, such as the Building, only warrants a part-time superintendent. (Sicherman Testimony, Tr. at 89:9-23; 112:19-23).

20. Sicherman's unrebutted testimony is that he informed plaintiff that the position of superintendent required five to six hours of work a day, Monday to Friday, and that the duties consisted primarily of janitorial work. (Sicherman Testimony, Tr. at 88:18-23).

21. Plaintiff accepted Sicherman's offer of employment and was hired by 1710 as a superintendent for the Building in or around August 1994. (Daniels Testimony, Tr. at 7:22-24; Sicherman Testimony, Tr. at 85:2-4; 88:18-24).

22. A couple of months after plaintiff's hiring as superintendent, a residential unit became available in the Building, and Sicherman offered plaintiff the apartment, Unit B-5, which plaintiff accepted. (Sicherman Testimony, Tr. at 88:25-89:5).

23. Throughout most of his employment with 1710, plaintiff resided in Unit B-5, which consisted of two bedrooms, a kitchen and a living room. (Daniels Testimony, Tr. at 23:5-23).

24. Plaintiff was not required to pay rent or utilities, including electricity and gas, for this apartment. (Joint Pretrial Order, Stipulated Facts ¶ 6).

25. From January 2008 to the end of plaintiff's employment in August 2009, the relevant time period for purposes of this action, 1710 paid plaintiff wages of $600 semi-monthly. (Joint Pretrial Order, Stipulated Facts ¶ 7; Daniels Testimony, Tr. at 14:21-23).

26. In or around 1995 or 1996, after plaintiff was hired as superintendent for the Building, extensive renovations were made to the Building and all of its residential units. (Sicherman Testimony, Tr. at 109:9-20).

27. Sicherman presented unrebutted testimony that the renovations to the Building included replacement of all bathtubs and commodes, total renovation of bathrooms, including new tiling, vanities, and faucets, installation of brand new plumbing, including new pipes, traps, waste vents, and steam valves, installation of new electric wiring, including hardwired smoke alarms, installation of new kitchen cabinets, replacement of lintels around all windows, installation of new locks including magnetic door locks, installation of new roofing and brick work, and painting of the entire Building. (Sicherman Testimony, Tr. at 105:19-23; 109:21-110:14).

28. Plaintiff performed no work in connection with the 1995-96 renovations, which was instead done by licensed contractors. (Sicherman Testimony, Tr. at 110:22-111:1).

29. Due to these extensive renovations, the need for replacement of fixtures and repairs in the residential units since 1996 was infrequent. (Sicherman Testimony, Tr. at 105:19-23).

30. In addition, whenever a resident vacated an apartment in the Building, additional renovations were done to the vacated unit, including replacement of bathrooms and moldings and lead abatement. (Sicherman Testimony, Tr. at 110:15-21). Such work was also done by licensed

contractors, not by plaintiff. (Sicherman Testimony, Tr. at 111:2-17; Daniels Testimony, Tr. at 41:5-19).

31. Plaintiff's primary duties were to sweep and mop the Building and to take care of the garbage on a daily basis. (Itzkowitz Testimony, Tr. at 136:11-15; Sicherman Testimony, Tr. at 111:18-112:3).

32. If a tenant required a minor repair, such as an occasional leaky faucet, plaintiff was able to handle such requests. (Sicherman Testimony, Tr. at 112:3-9; Itzkowitz Testimony, Tr. at 136:16-17).

33. Although plaintiff testified that the minor repairs he performed consisted primarily of painting, plumbing and plastering, his later testimony demonstrated that instances of such work were exceedingly rare. (Daniels Testimony, Tr. at 41:24-42:1; 52:1-3).

34. With respect to painting, plaintiff did minor touch-ups as a result of water damage only in cases of emergency. (Daniels Testimony, Tr. at 52:6-53:12).

35. Plaintiff could not recall how often he did such touch-ups, except to say that it was not a regular occurrence. (Daniels Testimony, Tr. at 52:6-53:12).

36. Plaintiff also contended that he performed painting touch-ups in the Building's hallways. (Daniels Testimony, Tr. at 53:14-54:19).

37. Plaintiff could not recall how often he did such touch-ups to the Building's hallways. (Daniels Testimony, Tr. at 54:13-19).

38. Plaintiff contended that he repainted the Building's lobby approximately once a year, but conceded that this job only took him about two hours. (Daniels Testimony, Tr. at 55:17-57:21).

39. With respect to plumbing, plaintiff admitted that all major repairs were handled by outside contractors beginning in 2006. (Daniels Testimony, Tr. at 60:9-61:15; 62:10-63:12; 64:15-65:16).

40. Plaintiff could not recall how often he performed minor plumbing repairs, but conceded it was as infrequent as once every three months, on average. (Daniels Testimony, Tr. at 65:5-16).

41. With respect to plastering, plaintiff testified that he only did minor plastering work, while most plastering was performed by outside contractors. (Daniels Testimony, Tr. at 70:6-71:12).

42. Plaintiff admitted that he could not recall whether he did any plastering work within the last three years of his employment with 1710. (Daniels Testimony, Tr. at 70:6-71:12).

43. Due to the part-time nature of plaintiff's job, he was "his own boss," able to get up whenever he wanted and to perform his duties at his leisure. (Sicherman Testimony, Tr. at 101:2-25).

44. Plaintiff was able to take rest breaks as frequently as he wished and take his lunch hour whenever and for however long he desired. (Itzkowitz Testimony, Tr. at 132:8-14).

45. Plaintiff had no set work schedule. (Itzkowitz Testimony, Tr. at 133:13-15).

46. When plaintiff was out of work for a couple weeks due to a medical issue, Sicherman had a superintendent from a nearby residential property take over plaintiff's duties. This superintendent devoted only a couple of hours each day to complete the janitorial work required for the Building. (Sicherman Testimony, Tr. at 112:24-113:6).

47. Max Itzkowitz ("Itzkowitz"), the property field manager for 1710 during the majority of plaintiff's tenure as building superintendent, visited the Building every other day, or

on average three times per week, for about ten to twenty minutes on each visit. (Itzkowitz Testimony, Tr. at 130:11-21; 131:4-23; 134:14-17).

48. Itzkowitz's unrebutted testimony was that during these visits he rarely saw the plaintiff, who was often not at the Building for a variety of reasons, including running personal errands or attending various appointments. (Itzkowitz Testimony, Tr. at 134:18-135:9).

49. Consistent with the fact that plaintiff had no set schedule, he was not prohibited from performing personal errands at any time during the day. (Itzkowitz Testimony, Tr. at 135:17-20).

50. Plaintiff alleged that he was told his hours of work were 8:00 a.m. to 6:00 p.m. during the weekdays, but his deposition and trial testimony were contradictory with respect to who, if anyone, informed plaintiff of these hours. Plaintiff testified inconsistently that (i) Itzkowitz told plaintiff those hours, although plaintiff could not recall when that discussion took place, and (ii) he could not recall who told him of his hours. (Daniels Testimony, Tr. at 42:16-43:10; 47:16-48:5).

51. Itzkowitz flatly denied ever telling plaintiff what his working hours were. (Itzkowitz Testimony, Tr. at 134:1-3).

52. Sicherman's unrebutted testimony is that he informed plaintiff that the position of superintendent required five to six hours of work a day, Monday to Friday. (Sicherman Testimony, Tr. at 88:18-23).

53. Although plaintiff contended that his workday began at 8:00 a.m., he admitted that he in fact sometimes began his day at 8:30 a.m. (Daniels Testimony, Tr. at 71:18-25).

54. On most workdays, at 2:30 p.m., plaintiff left the Building and drove his wife to work at the Green Park Nursing Care Center located at 140 St. Edwards Street in Brooklyn.

Plaintiff drove his wife to work on Mondays through Thursdays and on Sunday. (Daniels Testimony, Tr. at 19:15-19; 20:4-15; 69:8-10).

55. Plaintiff returned to the Building after dropping off his wife at work each day at around 3:00 p.m. or later depending on traffic. (Daniels Testimony, Tr. at 69:8-12).

56. Plaintiff took his lunch break at about 3:00 p.m. and returned to work at about 3:30 p.m. (Daniels Testimony, Tr. at 69:13-18).

57. On the days that plaintiff's wife did not work, including Fridays, plaintiff often ate lunch with her during his lunch hour. (Daniels Testimony, Tr. at 68:12-22).

58. After taking his lunch, plaintiff had no regular duties in the afternoon. (Daniels Testimony, Tr. at 69:19-70:2).

59. Plaintiff would sometimes end his day at 5:00 p.m. and return to his apartment. (Daniels Testimony, Tr. at 72:1-8; 74:1-17).

60. When plaintiff returned to his apartment at end of his day, he was free to do whatever he wanted, and that time was his own. (Daniels Testimony, Tr. at 74:18-75:5).

61. Itzkowitz, whose regular hours were 9:00 a.m. to 5:00 p.m., did not contact plaintiff after 5:00 p.m. and was never contacted by plaintiff after 5:00 p.m. (Itzkowitz Testimony, Tr. at 136:22-137:6).

62. Sicherman had no knowledge of any work performed by plaintiff after the end of his workday. (Sicherman Testimony, Tr. at 104:5-8).

63. If a tenant had a request after hours, they were provided a telephone number that they could call that would be routed to a handyman who could assist them. (Sicherman Testimony, Tr. at 104:5-17).

64. Plaintiff's deposition and trial testimony were contradictory with respect to whether plaintiff performed work on Saturdays. Plaintiff, a Seventh-Day Adventist, testified that: (i) "Yes, I don't work Saturdays"; and (ii) that he worked a couple hours on Saturdays. (Daniels Testimony, Tr. at 48:24-49:1; 49:9-16; 50:2-51:3).

65. Plaintiff was never told by anyone at 1710 that he was required to work on Saturdays. (Daniels Testimony, Tr. at 51:12-17).

66. Plaintiff never told anyone at 1710 that he performed work on any Saturday. (Daniels Testimony, Tr. at 51:18-21).

67. Plaintiff was never told by anyone at 1710 that he was required to work on Sundays. (Daniels Testimony, Tr. at 45:24-46:6).

68. Sicherman had no knowledge that plaintiff allegedly worked on any Saturday or Sunday. (Sicherman Testimony, Tr. at 114:18-115:2).

69. Itzkowitz, who never visited the Building on weekends, had no reason to believe that plaintiff was working weekends and never spoke to him during weekends. (Itzkowitz Testimony, Tr. at 133:8-12; 135:21-136:10).

70. Plaintiff decided on his own to work some weekends. (Daniels Testimony, Tr. at 46:3-9).

71. Wolf Sicherman has been managing residential property since 1978. (Sicherman Testimony, Tr. at 82:4-7).

72. As part of his extensive experience in real estate management, Sicherman was selected by the City of New York from among a number of other private management companies to manage certain properties owned by the City. (Sicherman Testimony, Tr. at 88:5-12).

73. During the period in which Sicherman managed property for the City of New York, his management company was always found to be in compliance with all pertinent laws and regulations. (Sicherman Testimony, Tr. at 98:12-19; 99:13-21).

74. Prior to this action, neither Sicherman nor his management company has ever been sued for failure to pay the required wages by any employee in his thirty-three year career managing residential property. (Sicherman Testimony, Tr. at 115:11-15).

PROPOSED CONCLUSIONS OF LAW

75. The Complaint was filed on January 5, 2010, and alleges three causes of action against 1710 in boilerplate fashion.

76. The First Cause of Action alleges failure to properly pay minimum wage and overtime in violation of the Fair Labor Standards Act ("FLSA").

77. The Second Cause of Action alleges failure to properly pay minimum, overtime, and spread-of-hours wages under the New York Labor Law.

78. The Third Cause of Action alleges failure to pay plaintiff's wages weekly in violation of New York Labor Law Section 191.

79. By plaintiff's counsel's letter dated July 22, 2010 to the Court, plaintiff has withdrawn and will not pursue his Second Cause of Action. Ltr. from Abdul K. Hassan, Esq., dated July 22, 2010 (Docket Document #17).

I. PLAINTIFF HAS THE BURDEN TO PROVE HE WAS NOT PROPERLY PAID FOR WORK PERFORMED.

80. An employee bringing an action for unpaid wages under the FLSA "has the burden of proving that he performed work for which he was not properly compensated." Rivera v. Ndola Pharmacy Corp., 497 F. Supp. 2d 381, 388 (E.D.N.Y. 2007) (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946)). See also Kolesnikow v. Hudson Valley

Hospital Center, 622 F. Supp. 2d 98, 118 (S.D.N.Y. 2009) (to prevail on his FLSA overtime claim, plaintiff "has the burden of proving that [he] was not properly paid for the time [he] actually worked").

81. "When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records." Anderson, 328 U.S. at 687. When no such records exist, the employee may meet this burden if he proves that he has in fact performed work for which he was improperly compensated. Anderson, 328 U.S. at 687; Kolesnikow, 622 F. Supp. 2d at 118.

82. In order to meet this burden, the plaintiff should not speculate. Kolesnikow, 622 F. Supp. at 118. Although the plaintiff may rely upon his recollection, he can only meet this burden by producing "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Anderson, 328 U.S. at 687; Kolesnikow, 622 F. Supp. 2d at 118; Rivera, 297 F. Supp. 2d at 388.

83. If the plaintiff meets this burden, "the burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." Kolesnikow, 622 F. Supp. 2d at 118 (quoting Yang v. ACBL Corp., 427 F. Supp. 2d 327, 331 (S.D.N.Y. 2005)).

84. Plaintiff, who relied solely upon his inconsistent, improbable and speculative testimony, failed to prove at trial as a matter of just and reasonable inference the amount and extent of his alleged additional hours worked.

85. Even if plaintiff had met his burden, 1710 offered compelling and credible evidence at trial that negates the reasonableness of any inferences to be drawn from plaintiff's testimony.

86. Therefore, plaintiff failed to prove that he worked any hours for which he was not compensated, and judgment should be rendered in favor of defendant with respect to all aspects of plaintiff's FLSA claim.

II. PLAINTIFF FAILED TO PROVE HE IS ENTITLED TO UNPAID OVERTIME AND MINIMUM WAGES UNDER THE FAIR LABOR STANDARDS ACT.

87. The Complaint conclusorily asserts that plaintiff worked more than forty hours a week in "some or all weeks." (Complaint ¶ 27).

88. The Complaint falsely alleges that plaintiff "was required to be on call . . . at all hours of the day, seven days a week." (Complaint ¶ 21).

89. Plaintiff's vague and insubstantial testimony at trial severely undercuts and entirely contradicts the Complaint's allegations. The record evidence demonstrates that: (i) plaintiff failed to meet his burden of demonstrating the extent and amount of hours worked during the weekdays; (ii) plaintiff was not "on call"; (iii) plaintiff did not work on Saturdays; and (iv) plaintiff was not directed to work on Saturdays or Sundays and, if he did so, it was completely without 1710's knowledge or acquiescence. Therefore, plaintiff cannot prove that he is entitled to any unpaid overtime or minimum wages.

A. There is No Evidence of What Hours Plaintiff Worked on Weekdays.

90. Plaintiff's vague, speculative and contradictory testimony at trial provides this Court with no basis to determine, as a matter of just and reasonable inference, either the extent of plaintiff's actual duties, or the amount of additional hours allegedly worked.

91. Plaintiff testified that some days he began work at 8:30 a.m., but he was unable to state with any particularity on which days. (Daniels Testimony, Tr. at 71:18-25).

92. On Mondays through Thursdays, plaintiff drove his wife to work, which took thirty minutes or longer depending on traffic. (Daniels Testimony, Tr. at 19:15-19; 20:4-15;

69:8-12). Plaintiff then took about a 30-minute break lunch. (Daniels Testimony, Tr. at 69:13-18). On the days that plaintiff's wife did not work, plaintiff took his lunch hour with her. (Daniels Testimony, Tr. at 68:12-22).

93. Plaintiff admitted that he had no regular duties in the afternoon after his lunch hour. (Daniels Testimony, Tr. at 69:19-70:2).

94. Plaintiff would sometimes end his day at 5:00 p.m. and return to his apartment, but he was unable to state with any particularity on which days. (Daniels Testimony, Tr. at 72:1-8; 74:1-17).

95. Plaintiff has no recollection of how many hours he actually worked on any given workday.

96. Plaintiff alleged that he was told his hours of work were 8:00 a.m. to 6:00 p.m., which is inconsistent with his trial testimony in which he admitted that on some days he began work at 8:30 a.m. and ended work at 5:00 p.m. (Daniels Testimony, Tr. at 71:18-25; 72:1-8; 74:1-17).

97. In addition, his trial testimony and deposition testimony are entirely inconsistent with respect to who, if anyone, informed him that 8:00 a.m. to 6:00 p.m. were his alleged hours of work. During his deposition, plaintiff testified that he could not recall who told him that these were his alleged hours. (Daniels Testimony, Tr. at 47:16-48:5). At trial, plaintiff contradicted his own deposition testimony and testified that Itzkowitz advised him of these hours, though he could not state with any particularity when that conversation with Itzkowitz allegedly took place. (Daniels Testimony, Tr. at 42:16-43:10; 47:16-48:5).

98. Plaintiff's inconsistent testimony as to whether he was told his hours were 8:00 a.m. to 6:00 p.m. is insufficient to meet his burden under the FLSA as to the hours he allegedly

worked. See Kuebel v. Black & Decker Inc., 2010 U.S. Dist. LEXIS 46533, at *38 (W.D.N.Y. May 12, 2010) (holding that plaintiff "failed to meet [his] burden" of proving as a matter of just and reasonable inference his hours worked when the "only testimony he has provided estimating his unpaid off-the-clock time contradicts his deposition testimony").

99. Plaintiff's allegation is also rebutted by the unequivocal testimony of Itzkowitz, who flatly denied ever telling plaintiff what his working hours were, and Sicherman, who presented unrebutted testimony that he personally advised plaintiff that his job only required five to six hours a day during the workweek. (Sicherman Testimony, Tr. at 88:18-23; Itzkowitz Testimony, Tr. at 134:1-3).

100. Plaintiff also has no recollection of the extent of work performed during his alleged hours of work.

101. Plaintiff's primary duties were janitorial -- to sweep and mop the Building and to take care of the garbage on a daily basis. (Sicherman Testimony, Tr. at 111:18-112:3; Itzkowitz Testimony, Tr. at 136:11-15).

102. Plaintiff's other duties consisted of minor repairs related to painting, plumbing and plastering, which were infrequent at best. (Daniels Testimony, Tr. at 41:24-42:1; 52:1-3). Plaintiff testified that: (i) he could not recall how often he performed painting touch-ups to any part of the Building; (ii) he painted the lobby of the Building once a year, which took only two hours; (iii) any plumbing repairs occurred as infrequently as once every three months; and (iv) he could not recall whether he did any plastering work within the last three years. (Daniels Testimony, Tr. at 52:6-53:12; 54:13-19; 55:17-57:21; 65:5-16; 70:6-71:12).

103. Therefore, plaintiff failed to provide sufficient evidence of exactly what work was performed during his alleged work hours.

104. It is unrebutted that when Sicherman had a superintendent from a nearby residential property take over plaintiff's duties while plaintiff was ill, it took that superintendent just a couple of hours each day to complete the work required for the Building. (Sicherman Testimony, Tr. at 112:24-113:6).

105. According to Sicherman, who owns a number of properties comparable in size to the Building, the duties required for the Building only warranted employing a part-time superintendent. (Sicherman Testimony, Tr. at 89:9-23; 112:19-23).

106. Because Plaintiff has not produced sufficient, consistent and credible evidence of the amount and extent of his work as a matter of just and reasonable inference, he has not met his burden under the FLSA to demonstrate that he performed any work for which he was not properly compensated. See Grochowski v. Phoenix Construction, 318 F.3d 80, 89 (2d Cir. 2003) (testimony that plaintiffs "usually worked" certain hours and did not know if they worked all Saturdays was "only speculation to establish what hours these plaintiffs worked" and did not allow a fact finder "to draw a reasonable inference about how many hours [plaintiff] worked"); Kolesnikow, 622 F. Supp. 2d at 118-19 (plaintiff's testimony that she worked an unspecified amount of time over forty hours, that she "sometimes" worked through her half-hour lunch break, and that she worked an unspecified amount of time past the end of her shift two or more times a week failed to provide a sufficient basis to infer that she worked more than forty hours in any given week); Kuebel, 2010 U.S. Dist. LEXIS 46533, at *38 (reliance upon contradictory testimony is insufficient for plaintiff to meet his burden of showing the amount of hours allegedly worked as a matter of just and reasonable inference).

B. Plaintiff was Not "on Call" on Weekdays.

107. The U.S. Department of Labor's regulations promulgated under the FLSA provide that "[a]n employee who is required to remain on call on the employer's premises or so close

thereto that he cannot use the time effectively for his own purposes is working while on call." 29 C.F.R. § 785.17.

108. When an employee is not confined to his home or any particular place and may come and go as he pleases, the "hours spent on call are not considered as hours worked." Nonnenmann v. City of New York, 2004 U.S. Dist. LEXIS 8966, at *89 (S.D.N.Y. May 20, 2004) (citing 29 C.F.R. § 778.223); see also Singh v. City of New York, 524 F.3d 361, 368, fn. 4 (2d Cir. 2008) (holding that employees may seek compensation for time spent "on call" when their employer restricts their ability to use time freely for their own benefit).

109. Plaintiff's testimony entirely undercuts the Complaint's allegation that he was "on call . . . at all hours of the day." (Complaint ¶ 21).

110. Plaintiff testified that no restrictions were placed upon him at any time, including after the end of his workday. When plaintiff returned to his apartment at the end of his workday, which was not later than between 5:00 and 6:00 p.m., he was free to do whatever he wanted, and that time was his own. (Daniels Testimony, Tr. at 74:18-75:5).

111. The testimony offered by 1710 corroborates plaintiff's testimony. Itzkowitz, whose regular hours were 9:00 a.m. to 5:00 p.m., did not contact plaintiff after 5:00 p.m. nor was he ever contacted by plaintiff after 5:00 p.m. (Itzkowitz Testimony, Tr. at 136:22-137:6). Sicherman also had no knowledge of any work performed by plaintiff after the end of his work day. (Sicherman Testimony, Tr. at 104:5-8). In fact, if a tenant had a request after hours, there was a number that they could call that would be routed to a handyman who could assist them. (Sicherman Testimony, Tr. at 104:5-17).

112. Plaintiff was at no time "on call."

C. Plaintiff Did Not Work on Saturdays.

113. Plaintiff again provided inconsistent testimony with respect to whether he worked on Saturdays.

114. During his deposition, plaintiff unequivocally testified that, as a Seventh-Day Adventist, he did not work on Saturdays, except for three times in the last six years during rare emergencies. (Daniels Testimony, Tr. at 48:24-49:1; 50:2-51:3). Plaintiff testified during his deposition, "Yes, I don't work Saturdays." (Daniels Testimony, Tr. at 48:24-49:1). At trial, plaintiff contradicted himself and claimed he worked a couple hours every Saturday. (Daniels Testimony, Tr. at 49:9-16).

115. Plaintiff's inconsistent testimony as to whether he worked on Saturdays is insufficient to meet his burden under the FLSA that he performed work on Saturdays for which he should be compensated. See Kuebel, 2010 U.S. Dist. LEXIS 46533, at *38 (W.D.N.Y. May 12, 2010) (holding that plaintiff "failed to meet [his] burden" of proving as a matter of just and reasonable inference his hours worked when the "only testimony he has provided estimating his unpaid off-the-clock time contradicts his deposition testimony").

116. By plaintiff's own admission, he did not perform any compensable work on Saturdays. (Daniels Testimony, Tr. at 48:24-49:1; 50:2-51:3).

117. With respect to plaintiff's vague contention that he worked three Saturdays over the past six years, it is simply too *de minimis* to permit plaintiff any recovery.

118. "[I]t is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved" under the FLSA. Singh v. City of New York, 418 F. Supp. 2d 390, 396 (S.D.N.Y. 2005) (quoting Anderson, 328 U.S. at 692. Therefore, "when the activity involves only minimal additional time beyond scheduled working hours, courts should disregard 'such trifles' and not award compensation." Singh, 418 F. Supp.

2d at 396 (quoting Anderson, 328 U.S. at 692). See also Kuebel, 2010 U.S. Dist. LEXIS 46533, at *38, fn. 10 (holding that plaintiff's conclusory testimony that he averaged one to five hours of uncompensated overtime per week was "simply too de minimis to permit the Court to make a just and reasonable inference as to the number of uncompensated hours plaintiff worked").

119. Plaintiff's allegation that he worked an unspecified number of hours over the course of three Saturdays in the past six years is too *de minimis* to provide any basis for an award of additional compensation.

D. 1710 Had No Knowledge of Plaintiff's Alleged Work on Weekends.

120. "Case law in this Circuit instructs that an 'employee . . . is only entitled to compensation for those hours of work of which the employer had actual or constructive knowledge.'" Kuebel, 2010 U.S. Dist. LEXIS 46533, at *42 (quoting Singh, 418 F. Supp. 2d at 397). See also Holzapfel v. Town of Newburgh, 145 F.3d 516, 524 (2d Cir. 1998) (holding that an employee is not working for the employer's benefit if the employer has no knowledge of it).

121. "[A]n employee may perform a task that seems reasonable in the context of his work, but which the employer neither required nor controlled, and for which therefore the employee is not entitled to be paid." Holzapfel, 145 F.3d at 523.

122. Plaintiff has the burden of proving that the work performed was "spent with the employer's actual or constructive knowledge." Id. at 521; Kuebel, 2010 U.S. Dist. LEXIS 46533, at *42.

123. Plaintiff admitted that no one from 1710 ever told him that he was required to work on Saturdays or Sundays. (Daniels Testimony, Tr. at 45:24-46:6; 51:12-17). Rather, plaintiff acknowledged that he decided on his own to work weekends without ever informing 1710. (Daniels Testimony, Tr. at 46:1-9).

124. This fact is corroborated by the unrebutted testimony of Sicherman and Itzkowitz, who testified that they had no knowledge and no reason to believe that plaintiff ever worked on a Saturday or Sunday. (Sicherman Testimony, Tr. at 114:18-115:2; Itzkowitz Testimony, Tr. at 133:8-12; 135:21-136:10).

125. Based upon the undisputed record evidence, 1710 neither directed plaintiff to work weekends nor had actual or constructive knowledge of any hours worked by plaintiff during weekends.

126. Therefore, plaintiff is not entitled to compensation for any hours of work allegedly performed on any Saturday or Sunday.

III. EQUITABLE TOLLING DOES NOT APPLY.

127. "Equitable tolling allows courts to extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances." Johnson v. Nyack Hosp., 86 F.3d 8, 12 (2d Cir. 1996). The equitable tolling doctrine is a "rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." Cao v. Wu Liang Ye Lexington Rest., Inc., 2010 U.S. Dist. LEXIS 109373, at *3 (S.D.N.Y. Sept. 30, 2010) (quoting Wallace v. Kato, 549 U.S. 384, 396 (2007)).

128. Thus, "equitable tolling is only appropriate in rare and exceptional circumstances in which a party is prevented in some extraordinary way from exercising his rights." Zerilli-Edelglass v. N.Y.C. Transit Auth., 333 F.3d 74, 80 (2d Cir. 2003).

129. There is no evidence in the record that plaintiff was prevented or deterred in any way from exercising his rights under the FLSA.

130. The alleged absence of an FLSA poster in the workplace is insufficient grounds to toll the statute of limitations. Cao, 2010 U.S. Dist. LEXIS 109373, at *3-4.

131. Therefore, the limitations period for plaintiff's FLSA claims is two years from January 5, 2010, the date of filing of the Complaint. 29 U.S.C. § 255(a).

IV. PLAINTIFF IS NOT ENTITLED TO DAMAGES UNDER NEW YORK LABOR LAW.

132. The Court does not have supplemental jurisdiction over plaintiff's Third Cause of Action, which alleges failure to pay plaintiff's wages weekly in violation of New York Labor Law Section 191, because it does not arise from the same case or controversy as his FLSA claim and presents novel and complex issues of state law. See 28 U.S.C. § 1367(a), (c).

133. Even if the Court had supplemental jurisdiction over plaintiff's New York Labor Law claim, plaintiff has not proven a violation and entitlement to liquidated damages.

134. Plaintiff was a building superintendent whose wages are governed by the New York State Department of Labor's Minimum Wage Order for the Building Services Industry, 12 N.Y.C.R.R. §§ 141, et seq. ("Wage Order").

135. The Wage Order applies to employers in the building services industry, which includes real estate and building owners engaged in whole or in part in renting or managing residential and commercial buildings. 12 N.Y.C.R.R. §§ 141-1.1, 141-3.1. It is undisputed that 1710 is an "employer" as defined in the Wage Order.

136. Persons employed to render any physical service in connection with the maintenance, care or operation of a residential building are defined as "janitors" under the Wage Order and are required to be paid on a "unit rate" basis, rather than an hourly basis, in accordance with specifically delineated unit rates set forth in the Wage Order. 12 N.Y.C.R.R. §§ 141-1.2, 141-3.4. It is undisputed that plaintiff, as a building superintendent, is a "janitor" under the Wage Order.

137. Therefore, plaintiff was not a "manual worker" under Section 191, but rather, was a "janitor" under the Wage Order. The Wage Order specifically contemplates that "janitors" such as plaintiff may be paid on a basis other than weekly. 12 N.Y.C.R.R. § 141-2.9.

138. Even if plaintiff were required to be paid weekly as a "manual worker" pursuant to Section 191, plaintiff is not entitled to liquidated damages.

139. Section 198, the remedial statute for Article 6 of the New York Labor Law, states that "upon a finding that the employer's *failure to pay the wage required* by this article was willful, an additional amount as liquidated damages equal to twenty-five percent of the total amount of the *wages found to be due*" are allowed to a prevailing plaintiff. N.Y. Labor Law § 198 (1-a) (emphasis added).

140. Plaintiff admits that he was paid all appropriate wages under the New York Labor Law.

141. 1710 did not "fail to pay the wage required" by Article 6 of the Labor Law, and there are no "wages due" plaintiff within the meaning of Section 198.

142. Therefore, Section 198 affords plaintiff no basis for recovery of liquidated damages because an award thereunder must be premised "upon a finding [of] the employer's failure to pay the wage required" and expressly based upon "the wages found to be due." N.Y. Labor Law § 198 (1-a).

CONCLUSION

143. Based upon the evidence presented at trial and for the reasons set forth above, defendant 1710 Realty LLC respectfully requests that the Court grant judgment in favor of defendant and grant it such other and further relief the Court deems just and proper.

Dated: New York, New York
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